Neutral Citation Number: [2014] EWCA Civ 335

Case No: B2/2013/2291

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT
His Honour Judge Hand QC
(Case No. 2CL 20031)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 27th March 2014

Before :

LORD JUSTICE RICHARDS
LORD JUSTICE BEATSON
and
LORD JUSTICE BRIGGS

- -

Between :

(1) Amit Patel **(2) Sonal Patel**	**Appellants**
- and -	
(1) John Paul Peters **(2) Celine Madeline LaRose Peters** **(3) David Neil Laurence Levy** **(4) Christine Anne Fox** **(5) John Charles Conway** **(6) Yvonne Teresa Conway**	**Respondents**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Nicolas Isaac and Cecily Crampin (instructed by **Morrisons Solicitors LLP**) for the **Appellants**
The **Respondents** represented themselves, with **Dr David Levy** speaking on their behalf

Hearing date : 17 March 2014

Judgment
As Approved by the Court

Lord Justice Richards :

1. This is an appeal against an order of His Honour Judge Hand QC, sitting in the Central London County Court, on preliminary issues in proceedings under the Party Wall etc Act 1996 ("the Act"). The procedures under the Act were triggered by building works proposed to be undertaken by the appellants at 36a Courthope Road, London NW3, a property of which they are leaseholders. The works affected three adjoining properties (numbers 34, 34a and 38 Courthope Road) of which the various respondents are either the freehold owners or leaseholders. By virtue of section 20 of the Act, the appellants and the respondents are all treated as "owners" of their respective properties for the purposes of the Act.

2. The central issue is whether the appellants' surveyor refused or neglected to act effectively, within section 10(6) or (7) of the Act, with the consequence that the respondents' surveyor was empowered to act *ex parte* in issuing awards in respect of his own fees.

The legislative framework

3. Section 10(1) of the Act provides that where a dispute arises or is deemed to have arisen between a building owner and an adjoining owner in respect of any matter connected with any work to which the Act relates, either (a) both parties shall concur in the appointment of one surveyor (referred to as an "agreed surveyor") or (b) each party shall appoint a surveyor and the two surveyors so appointed shall forthwith select a third surveyor.

4. The section contains detailed provisions as to the powers of the surveyors so appointed or selected. The provisions directly in issue are subsections (6) and (7) but the award-making powers under subsections (10) and (11) are also relevant:

> "10 … (6) If a surveyor –
>
> > (a) appointed under paragraph (b) of subsection (1) by a party to the dispute …
>
> refuses to act effectively, the surveyor of the other party may proceed to act *ex parte* and anything so done by him shall be as effectual as if he had been an agreed surveyor.
>
> (7) If a surveyor –
>
> > (a) appointed under paragraph (b) of subsection (1) by a party to the dispute …
>
> neglects to act effectively for a period of ten days beginning with the day on which either party or the surveyor of the other party serves a request on him, the surveyor of the other party may proceed to act *ex parte* in respect of the subject matter of the request and anything done by him shall be as effectual as if he had been an agreed surveyor.
>
> …

> (10) The agreed surveyor or as the case may be the three surveyors or any two of them shall settle by award any matter –
>
> (a) which is connected with any work to which this Act relates, and
>
> (b) which is in dispute between the building owner and the adjoining owner.
>
> (11) Either of the parties or either of the surveyors appointed by the parties may call upon the third surveyor selected in pursuance of this section to determine the disputed matters and he shall make the necessary award."

5. By subsection (12) an award may determine the right to execute any work, the time and matter of executing any work, and any other matter arising out of or incidental to the dispute "including the costs of making the award". By subsection (13) the reasonable costs incurred in (a) making or obtaining an award under the section, (b) reasonable inspections of works to which the award relates, and (c) any other matter arising out of the dispute, shall be paid by such of the parties as the surveyor or surveyors making the award determine.

6. Subsection (17) provides that either of the parties to the dispute may, within the period of fourteen days beginning with the day on which an award under the section is served on him, appeal to the County Court against the award.

The facts

7. In this case the appellants appointed Mr Justin Burns BSc, MRICS as their surveyor, and the respondents appointed Mr Grant Wright BSc, FRICS as theirs. The two surveyors then selected Mr Alex Frame MSc, MRICS as the third surveyor.

8. The judge refers in his judgment to the complete breakdown of professional relationships between Mr Burns and Mr Wright. Fortunately, however, as the judge observed, it is not necessary to consider their general conduct for the resolution of the issues in the appeal, nor does anything turn on their oral evidence which the judge heard.

9. Party wall awards relating to numbers 34a/36a and 36a/38 were made jointly by Mr Burns and Mr Frame in September 2011, and a party wall award relating to numbers 34/36a was made *ex parte* by Mr Burns in October 2011. The awards contained schedules of condition and details of the works that the appellants were to be at liberty to carry out. Those matters and the circumstances in which the awards came to be made are not material for the appeal.

10. Each of the awards contained a clause providing that the appellants were to pay Mr Wright's reasonable expenses in connection with the preparation of the award and one subsequent inspection, "the quantum of such expenses to be agreed or awarded by any 2 of the 3 surveyors". Whilst that clause purported to lay down specific machinery for the determination of the expenses, it was common ground before us that the clause

was not legally effective to displace the operation of the statutory provisions governing the making of awards as to costs.

11. By an email exchange on 26 September 2011 the parties' surveyors set out broadly where they stood in relation to the calculation of Mr Wright's fee. Mr Wright proposed that it be calculated on the basis of his total time commitment, to be ascertained by reference to his timesheets, whereas Mr Burns indicated that he intended to judge it on the basis of the time that a competent surveyor *should* have spent on the matter (minus the third surveyor's fee), rather than the time Mr Wright claimed to have spent on it, and that he would not therefore need to see the timesheets.

12. In a letter to Mr Burns dated 1 December 2011, Mr Wright referred to previous communications about timesheets and attached a set of manuscript timesheets for review. The letter concluded:

> "We have a duty to try to agree appropriate fees to include [in the awards] and it is my intent to do so. In the event, however, that we do not fully agree such, then we should aim to minimise and precisely identify the time commitments recorded and corresponding works, which are not agreed, so that only any such precise times/issues and works (if not then compromised upon/agreed, further to discussions with Owners) would be referred to the Third Surveyor, as being in dispute.
>
> Time commitments recorded re. the 3/4 No. Awards re. the periods, as set out below …. [The letter then gave details of hours spent in various periods, amounting to a total of 90.3 hours, which at the stated rate of £150 per hour plus VAT equated to a total fee of £13,545 plus VAT.]
>
> I re-state my willingness to attend your office and work through timesheet records and the files to establish causes of time expenditure and liability, in an effort to minimise the extent of any dispute (hopefully, perhaps pertaining to only the period from 31/8/11 onwards).
>
> When the sums are agreed re. the above, naturally, the usual allowances will need to be added for on-site inspections."

13. In a follow-up letter dated 13 December 2011, Mr Wright requested Mr Burns to confirm that he had received the letter of 1 December and that he would shortly be responding and/or arranging a meeting, "to avoid the need for Notice being served upon you and/or of me asking Mr Frame to enjoin with me to advance a proper review of time commitments, causes and liabilities".

14. In a letter dated 21 December 2011, relied on by the respondents as a formal request under section 10(7) of the Act, Mr Wright said that Mr Burns had still not acknowledged receipt of his "letter and submission" of 1 December nor of the letter of 13 December. After complaining about that lack of response and other matters, the letter continued:

> "Even though your conduct towards me has been unprofessional and disappointing, I would not be so 'ungentlemanly' as to serve a Ten Day Notice upon you across a holiday period, without consideration of such and thus, whilst you must take this as Notice served upon you to act effectively under Section 10(6) and (7), I will not be considering that the ten days have expired re. Section 10(7), until the public holidays have been adjusted for. If you fail to respond effectively to my submission and offer to jointly review the timesheets and works, etc. then I will exercise my authority to either proceed ex-parte or to enjoin with Mr Frame, to advance the matter, as I advised you in my letter of 13/12/11."

15. Mr Burns did not respond within the 10 day period (adjusted for public holidays) specified in the request. He did, however, respond soon afterwards, by letter dated 6 January 2012 which reflected the stance he had adopted in the September 2011 email exchange. The letter stated:

> "Thank you for your letter dated 1st December 2011 regarding your proposed fee. I'm sure you will not be surprised to hear that it is unacceptable.
>
> As previously stated, I do not intend to go through your timesheets as I already know that a large percentage of the time you expended on this matter was unnecessary and inappropriate. It is not fair to expect me to pick through your barely legible notes to establish what was and wasn't relevant.
>
> I will therefore measure your proposed fee against the time I think a reasonably competent surveyor would have spent on these awards considering the scope and complexity of the proposals (notwithstanding the fact that some of these tasks could have been undertaken by an administrator or assistant surveyor on a much lower hourly rate) i.e.
>
> …. [The letter then gave details of items of work and hours allowed for them, amounting in total to 19.5 hours which at £150 per hour produced a figure of £2,925. From that figure was deducted the fee of £900 charged by the third surveyor to complete the awards for numbers 34 and 38a, leaving a net amount of £2,025.]
>
> If you are not willing to agree a fee at this level please proceed with a referral to the third surveyor."

16. In a letter dated 13 January 2012 Mr Wright recorded that he did not consider that Mr Burns's response to the request served on him amounted to acting effectively. Mr Wright then proceeded to act *ex parte* in issuing three addendum awards dated 7 February 2012 in respect of his own fees.

The proceedings in the County Court

17. The trial before Judge Hand was of four preliminary issues. A fifth was not proceeded with.

18. The first preliminary issue was whether the purported "notice" (i.e. request) dated 21 December 2011 under section 10(7) of the Act was valid. The second preliminary issue was whether the wording of the letter altered the 10 day period under section 10(7) and, if so, how. The judge took those two issues together and held that the request was valid and that the wording of the letter did not alter the 10 day period in any way that rendered the request invalid. In reaching that conclusion, he rejected arguments on behalf of the appellants that (a) the request was not valid because the letter of 21 December 2011 specified a timescale other than that stipulated by section 10(7), and (b) the letter did not relate to a valid subject matter. On the latter point the judge held at paragraph 36 of his judgment that "it was clear as at 21 December 2011 the request being made by Mr Wright for Mr Burns to consider the timesheets was, in reality, a request to reach an agreement with Mr Wright as to his fees", and at paragraph 38 that "the request by Mr Wright was sufficiently clearly about the dispute to make it a valid request".

19. The third preliminary issue was whether Mr Burns responded to the request in time. It is plain from the way the judge dealt with the matter that he understood the issue to be whether Mr Burns responded within a 10 day period (adjusted for public holidays) following receipt of the letter of 21 December 2011. He answered that question in the negative. It is also plain from the judge's reasoning, however, that he took the view that a valid response could in principle be made outside the 10 day period provided that the requesting surveyor had not yet proceeded to act *ex parte* in respect of the subject matter of the request. He stated at paragraph 26 that section 10(7) does not provide a notice period in the same way as, for example, section 10(17), which lays down the period within which an appeal against an award must be brought. He continued:

> "I accept, of course, it gives notice to the other party that in the event of action not having been taken within a period of time then the first party will thereafter be at liberty, if so disposed, to take action in a particular way. But the Act does not require the party giving notice to take action immediately upon the expiration of the period. It only permits him or her to do so. In my judgment it creates a continuing state of affairs and I would venture to suggest, without deciding, because it is not covered by the preliminary issues, that the state of affairs ends either by the neglectful party taking action in respect of the subject matter of the request or by 'the surveyor of the other party' commencing to act 'ex parte'."

20. The fourth preliminary issue was whether Mr Burns refused or neglected to act effectively. The judge answered that question in the affirmative. He proceeded on the implicit basis, discussed above, that the absence of a response from Mr Burns within the 10 day period (adjusted for public holidays) was not determinative. He looked instead at the character of Mr Burns's actual response of 6 January 2012. After referring to a County Court decision in *A Bansal v AW Myers* (26 October

2007), which in his view probably turned on its own facts, he continued, at paragraph 45:

> "Here the letter of 6 January 2012 is of an entirely different character; Mr Burns had not asked for more time in order to consider matters with his client as was the case in *Bansal v Myers*. Consistent with what Mr Burns had said before he rejected the time sheets as irrelevant; he put forward his own figure, based on his view as to what was reasonable and said that, failing agreement of his figure by Mr Wright, the matters should be referred to the third surveyor. Subject to the proviso (explained above) as to whether a debate about costs is within the scope of section 10(6) and (7) I have no doubt that this was *both* a refusal to act *and neglecting to act effectively*".

21. The italicised words in the last sentence were not included in the draft of the judgment originally handed down but were added following argument before the final order was drawn up. For the purposes of the present appeal, nothing turns on the proviso to which the judge referred in that sentence.

The appeal to this court

22. Permission to appeal to the Court of Appeal was granted on the basis that the appeal would raise important points of principle under the Act. The written and oral submissions of Mr Isaac for the appellants and of Dr Levy, appearing in person on his own behalf and as spokesman for the other respondents, did raise various points of principle. In the event, however, it seems to me that the resolution of the dispute between the parties turns to a large extent on the particular facts of the case rather than on points of principle.

23. The first ground of appeal is that the judge was wrong to find that the statement in the letter of 21 December 2011 that "I will not be considering that the ten days have expired re. Section 10(7), until the public holidays have been adjusted for" did not invalidate the request. At the hearing before us, however, Mr Isaac made clear that he was not pursuing that ground. In my view he was right not to pursue it. The 10 day period under section 10(7) is laid down by the statute. The fact that the requesting surveyor indicates an intention to allow a longer period for a response neither affects the statutory period nor invalidates the request. The judge was clearly right so to find. Whether the requesting surveyor would be estopped from acting *ex parte* before the expiry of the longer period specified by him is not a question that arises on the facts of this case and it is therefore unnecessary to consider the written submissions addressed to the point.

24. A question that does arise, however, is whether the judge was right to hold that section 10(7) creates "a continuing state of affairs", as he put it, so that a surveyor who neglects to act effectively *within* the 10 day period may still act effectively *after* that period, and thereby preclude the requesting surveyor from acting *ex parte* in respect of the subject matter of the request, provided that the requesting surveyor has not yet proceeded so to act. The judge did not think it necessary to decide that question because it was not covered by the preliminary issues. In my view, however, the point is integral to the fourth preliminary issue which asks *inter alia* whether Mr

Burns neglected to act effectively. Mr Burns did not respond to Mr Wright's request within the 10 day period; but the appellants' case is that he acted effectively by his subsequent response dated 6 January 2012. It is therefore necessary to decide whether it was open in principle to Mr Burns to provide an effective response after the expiry of the 10 day period.

25. I was concerned at one point that this question might not be engaged by the grounds of appeal. Mr Isaac satisfied me, however, that it was covered by the third ground, which is a general challenge to the judge's finding that Mr Burns refused and/or neglected to act effectively. The question was, moreover, covered fully in the written and oral submissions of Dr Levy, who took issue with the judge's statement that section 10(7) creates a continuing state of affairs and argued that since Mr Burns did not act at all within the 10 day period he could not be said to have acted effectively.

26. I am in agreement with the view expressed by the judge on this question. Section 10(7) empowers the requesting surveyor to proceed to act *ex parte* in respect of the subject matter of a request if (i) the surveyor on whom the request is served neglects to act effectively and (ii) a period of 10 days has elapsed since the request was served; but there is nothing in the subsection to suggest that if the "defaulting" surveyor brings his neglect to an end and acts effectively after the expiry of the 10 day period but before the requesting surveyor has proceeded to act *ex parte*, the requesting surveyor can nevertheless still proceed to act *ex parte*. In that respect the subsection differs, as the judge observed, from section 10(17) which lays down a time limit for bringing an appeal and plainly operates to debar the bringing of an appeal outside the period specified.

27. That view is reinforced by consideration of the evident purpose of section 10(7), namely the avoidance of delay occasioned by the failure of one of the surveyors to act effectively in relation to a particular matter. If that surveyor neglects to act effectively for a period of 10 days after service of a request on him, the requesting surveyor can get on with the matter by proceeding to act *ex parte*. If, however, the surveyor in receipt of the request acts effectively after the 10 day period but before relevant action has been taken by the requesting surveyor, the rationale for empowering the requesting surveyor to act *ex parte* has disappeared and there is no reason why the normal procedures under section 10 should not apply. On the case advanced by Dr Levy, the surveyor in receipt of the request would lose the right to act effectively once the 10 day period had expired, so that the requesting surveyor could then take as much time as he wanted before proceeding to act *ex parte* in respect of the subject matter of the request (I note that Mr Wright took over a month before purporting to act *ex parte* in issuing the costs awards). In my view that cannot be right. Dr Levy also argued that the judge's approach, by contrast, would encourage more *ex parte* awards since surveyors who had made requests under section 10(7) would be inclined to act immediately on the expiry of the 10 day period. For my part, however, I do not regard speedy *ex parte* action as a problem in principle. It is contemplated by the subsection and accords with the underlying policy.

28. With those preliminaries out of the way, I can turn to the substance of Mr Wright's request dated 21 December 2011 and of Mr Burns's response dated 6 January 2012. The second ground of appeal challenges the judge's findings that the letter of 21 December 2011 was a request that Mr Burns reach an agreement with Mr Wright as to his fees and that the request was sufficiently clear to be valid. The third ground

contends that the judge was wrong to find that Mr Burns refused and/or neglected to act effectively. In his oral submissions, however, Mr Isaac developed the case for the appellants in a way that brought the two grounds together whilst at the same pushing the issues of substantive validity into the background.

29. Mr Isaac's core submission was as follows. The letter of 21 December 2011, read with the letter of 1 December 2011 to which it referred, was *either* a request to Mr Burns to agree Mr Wright's proposed fee *or* a request to review the timesheets with a view to agreeing the fee. Whichever way the letter of request is read, Mr Burns acted effectively by his response of 6 January 2012. In so far as the request was to agree a fee, Mr Burns made clear that he considered Mr Wright's figure to be too high and he put forward his own figure. In so far as the request was to review the timesheets, he made clear that he considered a review of the timesheets to be inappropriate for the reasons he gave, and he gave details of the time that in his view a reasonably competent surveyor would have spent on the awards. He stated that if Mr Wright was not willing to agree a fee at the level proposed by Mr Burns the matter should be referred to the third surveyor. Thus, there was no refusal or neglect to act effectively. The correspondence identified the dispute between the surveyors. It was a classic situation for the involvement of the third surveyor, not for one of the parties' surveyors to proceed *ex parte*.

30. I am satisfied that Mr Isaac's submissions on those matters are correct. Paragraph 45 of the judgment below does not explain *why* the judge considered Mr Burns's stance to amount to a refusal or neglect to act effectively, and I find it difficult to see the basis for his conclusion. It is true that Mr Burns refused to review the timesheets; but he gave a reasoned justification for that refusal and he put forward a reasonable alternative basis on which he said the fee should be calculated. He engaged head-on with the subject-matter of the request and set out his position in respect of it. To my mind, this came nowhere near to a refusal or neglect to act effectively. On the contrary, Mr Burns was acting effectively as the building owners' surveyor in crystallising a dispute that had been apparent since at least the September 2011 email exchange and that cried out for referral to the third surveyor.

31. I should mention that the written submissions, and to some extent Dr Levy's oral submissions, included a discussion of the distinction between "refusal" and "neglect" in section 10(6) and (7) respectively. I think it unnecessary, however, to engage in any analysis of those concepts for the purposes of the present appeal. My clear view that Mr Burns acted effectively by his letter of 6 January 2012 disposes of any question of refusal or neglect to act effectively, however precisely they are defined.

32. I should also mention that Dr Levy relied on the statement in an RICS Practice Standards guidance note on *Party wall legislation and procedure* (6th edition, paragraph 7.5.1) that it is usual for an award to include surveyor's fees "as a lump sum based on time incurred". He argued that by refusing to act on the usual time basis and by demanding the use of a "summary assessment" method, Mr Burns was refusing to act effectively in the matter of fees. I do not accept that argument. Even if the usual basis for charging is that of time spent, it was reasonable for Mr Burns to put forward the alternative basis in this case. By putting forward such an alternative he was, as I have said, engaging with the matter of fees, not refusing to act effectively in relation to it.

Conclusion

33. For the reasons given I would allow the appeal to this court. It follows from the conclusions I have reached that Mr Wright did not have the power under section 10(6) or (7) to act *ex parte* in relation to the costs awards and that those awards should be quashed. The precise way in which that should be reflected in the order of this court, together with other consequential matters, can be left for agreement between the parties or for written submissions if they cannot agree.

Lord Justice Beatson :

34. I agree.

Lord Justice Briggs :

35. I also agree.